



POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :

- against - :

FINAL

Police Officer Brian Davis :

ORDER

Tax Registry No. 931624 :

OF

Military & Extended Leave Desk :

DISMISSAL
-----X

Police Officer Brian Davis, Tax Registry No. 931624, having been served with written notice, has been tried on written Charges and Specifications numbered 2022-27034, as set forth on form P.D. 468-121, dated August 19, 2022 (amended October 13, 2022), and after a review of the entire record, Respondent is found Guilty.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Brian Davis from the Police Service of the City of New York.

KEECHANT L. SEWELL
POLICE COMMISSIONER

EFFECTIVE:

11/1/22

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POLICE DEPARTMENT

October 28, 2022

-----X
In the Matter of the Charges and Specifications :

Case No.

- against - :

2022-27034

Police Officer Brian Davis :

Tax Registry No. 931624 :

Military & Extended Leave Desk :

-----X
At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Jeff S. Adler
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department:

David Green, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent:

John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

HONORABLE KEECHANT L. SEWELL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Police Officer Brian Davis, while assigned to Strategic Response Group 1, on or about and between February 10, 2022 and August 10, 2022, wrongfully ingested a controlled substance, to wit: cocaine, without police or medical necessity. *(As amended)*

A.G. 304-06, Page 1, Paragraph 1

PROHIBITED CONDUCT
GENERAL REGULATIONS

2. Police Officer Brian Davis, while assigned to Strategic Response Group 1, on or about and between February 10, 2022 and August 10, 2022, wrongfully possessed a controlled substance, to wit: cocaine, without police or medical necessity. *(As amended)*

A.G. 304-06, Page 1, Paragraph 1

PROHIBITED CONDUCT
GENERAL REGULATIONS

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on October 20 and 21, 2022. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Dr. Joseph Ciuffo, Police Officer Shannon Daily, Sergeant Kelly Riley, and Dr. Ryan Paulsen as witnesses. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent Guilty, and recommend that he be DISMISSED from employment with the New York City Police Department.

ANALYSIS

On August 10, 2022, Respondent was randomly selected to appear at the Department's Medical Division in order to provide a hair sample for drug testing. Police Officer Shannon Daily of the Drug Screening Unit testified that when Respondent appeared that day, she collected hair samples from his arm in accordance with the unit's established sample collection

procedures. Daily, who is certified through Quest Diagnostics and Psychemedics Corporation to take such samples, first had Respondent fill out a questionnaire (*see* Dept. Ex. 2, "Hair Collection Discovery Package," at p. 4). In the questionnaire, the only prescription medication that Respondent indicated he was taking in the past three months was for allergic reaction to shell fish. Daily also prepared three "Custody and Control" forms for the three samples to be taken, each of which contained a unique number (03-1432-22-XH) assigned to Respondent, by which he was anonymously identified for purposes of the drug test. (Dept. Ex. 4; Tr. 45, 54-58)

Before taking the samples, Daily cleaned the testing room; she wiped the workbench with alcohol and placed wax paper on the table. She put on sterile gloves and used a new disposable razor in order to remove the samples. Daily testified that at Respondent's request, she removed the hair from his arm, and divided the hair into three samples which she placed onto three separate strips of aluminum foil. She folded up each of the three samples and placed them into separate paper envelopes which she sealed; each paper envelope was labelled with an identifying tracking number taken from the Custody and Control forms. Respondent and Daily signed the Custody and Control forms, and Respondent initialed the paper envelopes. The three paper envelopes, each with the accompanying Custody and Control forms, were then placed inside three separate plastic envelopes and sealed. The A and B samples were placed inside a secured lock box, in preparation for them being packaged that night for FedEx delivery to Psychemedics Lab, while the C sample was held for possible further testing. (Tr. 61-80, 83-89)

Sergeant Kelly Riley of the Drug Screening Unit testified that on August 29, 2022, she met with Respondent, who came to her office and requested that his C sample be tested. That sample had been secured inside a safe in her office. Riley reviewed with Respondent the "Request for Reconfirmation" form, and had Respondent initial a "Chain of Custody Transfer

Form" which she then signed (Dept. Ex. 4). At Respondent's request, Riley forwarded the C sample by FedEx to Quest Diagnostics in order to be tested. (Tr. 95-97, 100-06)

Dr. Ryan Paulsen is the Senior Analytical Chemist for Mass Spectrometry at Psychemedics Corporation, a drug-testing laboratory located in in California which is certified by the New York State Department of Health. Based on the qualifications cited in his curriculum vitae, as well as his other certifications and experience (Dept. Exs. 10-14), Dr. Paulsen was qualified as an expert in forensic toxicology, specifically in the area of mass spectrometry. Dr. Paulsen testified that his laboratory's drug screening methods have been approved by the FDA. (Tr. 117-18)

According to Dr. Paulsen, cocaine that is ingested into the body enters the bloodstream. Some of the cocaine will go through the liver and be metabolized. The cocaine in the bloodstream is incorporated into an individual's growing hair shaft. When testing hair samples for the presence of cocaine, Psychemedics initially performs an Enzyme Immunoassay ("EIA") screening test on a portion of hair from Sample A. If that result is negative, no additional tests are conducted, and the test result is reported as a negative. (Tr. 120, 124, 128)

However, if the EIA screening test yields a presumptive positive result for the presence of cocaine, further testing is performed. Dr. Paulsen testified that an additional portion of hair from Sample A is subjected to a thorough washing process in order to decontaminate the hair. That sample is then subjected to mass spectrometry testing. If it is determined that cocaine is present in the hair at a concentration level that meets or exceeds the cutoff of five nanograms of cocaine per ten milligrams of hair, the test result is confirmed as a positive. A portion of hair from Sample B then undergoes the same washing and mass spectrometry testing process. If the test on Sample B also yields a reading that meets or exceeds the cutoff, the subject's test result is

reported as positive for cocaine. Dr. Paulsen explained that the cutoffs are designed to rule out someone who may have inadvertently ingested cocaine or was a one-time user; anyone who shows a concentration of cocaine greater than the cutoff is someone who is regularly using the drug. (Tr. 124-29, 132-34, 138, 152, 160, 164-65, 168, 170-71)

Dr. Paulsen testified that he reviewed Psychemedics' "Laboratory Data Package" prepared in connection with this case, which includes documentation of Respondent's drug test results (Dept. Ex. 5). From his review, Dr. Paulsen determined that in Sample A, Psychemedics found cocaine at a concentration of 41.3 nanograms per 10 milligrams ("41.3ng/10mg") of hair, over eight times the cutoff. Additionally, two metabolites of cocaine were detected: benzoylecgonine was found at a concentration of 3.69ng/10mg of hair, and norococaine at 1.14ng/10mg of hair, both above the cutoff in that they were present at a concentration greater than five percent of the concentration of the cocaine. In Sample B, cocaine was found at a concentration of 56.5ng/10mg of hair, roughly 10 times the cutoff. The metabolites of benzoylecgonine (5.78ng/10mg of hair) and norococaine (1.72ng/10mg of hair) also were detected at concentrations above the cutoff. Dr. Paulsen also noted that from his review of the records, Quest Diagnostics reported that Sample C was positive for cocaine, which was consistent with the findings of Psychemedics; however, Dr. Paulsen, himself, is not affiliated with Quest, and was not involved in their testing. (Tr. 137-40, 146-47, 176-77)

Based upon his review of the documentation in this matter, Dr. Paulsen offered his expert opinion: the evidence indicates that Respondent ingested a significant amount of cocaine over the six-month period from February 10, 2022 through August 10, 2022. (Tr. 148-49)

Dr. Joseph Ciuffo, the Deputy Chief Surgeon of the Medical Division, is certified as a Medical Review Officer to review positive drug test results, and consider if there are alternative

medical explanations for the positive result. Dr. Ciuffo testified that he did a thorough medical review of the drug screening results in this matter. On August 19, 2022, Dr. Ciuffo had a telephone conversation with Respondent about his drug test. Respondent confirmed that the sample collection process went smoothly. Dr. Ciuffo asked Respondent whether he could explain his positive test results for cocaine, and Respondent answered that he had no explanation. Respondent mentioned that in addition to the medication he was taking for gout, he also was taking a pre-workout supplement, but Dr. Ciuffo explained to him that this would not cause the positive results for cocaine. Based on his review of this case, Dr. Ciuffo, in his expert opinion, verified the cocaine-positive test results, and issued a report (Dept. Ex. 9) summarizing his findings. (Tr. 14, 17-19, 23-25, 33-35, 40-41)

Respondent testified that in July of 2020, while assigned to the Strategic Response Group, he and his colleagues were overrun by a large violent crowd marching through the streets of the city. Respondent suffered multiple injuries to his knee requiring surgery, and he was approved for a three-quarters disability in June of 2022. As a result, he was assigned to administrative duties. (Tr. 196-202)

On August 10, 2022, Respondent appeared at the Medical Division for a random drug test. Respondent testified that hair samples were taken from his arms. He acknowledged that Officer Daily was pleasant in her interactions with him, and he did not see her do anything suspicious. Approximately eight days later, Respondent was informed by IAB that he had failed the drug test. On August 19, 2022, Dr. Ciuffo called him on the phone to inform him that he had tested positive for cocaine. According to Respondent, Dr. Ciuffo was "very condescending" during the call. When Respondent asked him for the precise numbers from his test results, Dr. Ciuffo answered that he did not have access to his paperwork at the moment, so he could not

provide the numbers. Respondent confirmed that his interactions with Sergeant Riley regarding Sample C occurred just as described by the sergeant. (Tr. 203-05, 208-09, 220-26)

Respondent testified that he has never used cocaine. At the time he tested positive, his brother, a heavy user of crack cocaine, was living in the basement of their elderly mother's home. Respondent would visit her there every day; during some of those visits, his brother would be in the basement smoking. Respondent testified that he could always smell the odor of crack cocaine, and he inhaled the smoke. However, he and his brother were never in the same room when the brother was smoking. Respondent, on the advice of his mother, did not report his brother or take any action against him; he was concerned that a domestic incident with his brother would impact negatively on his job with the Department. Respondent could not provide any other explanation for his positive test results. (Tr. 205-06, 209-13, 218, 227, 230-31)

Respondent offered into evidence a typed letter signed by his mother dated October 19, 2022. In that letter, she professes Respondent's innocence, and describes him as hard-working and humble. She also notes that Respondent's brother has a drug problem, and would be in the basement of her home smoking drugs when Respondent came to visit her every day. She believes her body, and Respondent's, have been contaminated by the brother's drug use. (Resp. Ex. A; Tr. 215-17)

Dr. Paulsen testified on rebuttal that in his expert opinion, it is "extremely unlikely" that Respondent's positive test results were caused by his inhaling secondhand smoke from his brother. He explained that from studies he has reviewed, he is "skeptical" that exposure to secondhand smoke as described by Respondent could lead to results above the cut-off levels, let alone the extremely high numbers found in Respondent's results which were roughly ten times the cutoff. Dr. Paulsen also noted that if Respondent had, in fact, been exposed to such a large

amount of secondhand smoke, one would expect to see some trace of it in the wash that was performed before the samples were tested; here, no cocaine was detected in the last wash.

According to Dr. Paulsen, once you're above the cutoff, any suggestion that the positive test results are due to unintentional, frequent exposure to cocaine in the air "is not a plausible story." (Tr. 130-31, 234-39, 241-42)

Each of the witnesses for the Department Advocate testified credibly and convincingly regarding their role in this process, and I find that the samples were properly collected from Respondent, that the chain of custody was intact, and that the tests were performed as described by Dr. Paulsen with the results he articulated. I also credit Dr. Ciuffo with respect to his conversation with Respondent, and his subsequent verification of the cocaine-positive test results. With that in mind, we turn to the two specifications.

Specification 1 charges Respondent with wrongfully ingesting cocaine, while Specification 2 alleges that he wrongfully possessed cocaine. As indicated above, I credit the evidence presented by the Department Advocate's witnesses as to the positive test results. Specifically, Respondent's A sample tested positive for cocaine at a concentration of 41.3ng/10mg of hair, approximately eight times the cutoff level of 5ng/10mg of hair. That sample also tested positive for two cocaine metabolites at levels above the cutoff level. Respondent's B sample tested positive for cocaine at a concentration of 56.5ng/10mg of hair, more than 10 times the cutoff level. That sample also tested positive for the two cocaine metabolites. Additionally, the test result from Quest on Sample C was consistent with the test results from Psychemedics.

Indeed, Respondent does not dispute the accuracy of these test results, but adamantly denies ever using cocaine in any form. He suggests that his positive test results may stem from

contact with his brother, who regularly smoked crack-cocaine inside their mother's home. Although Respondent and his brother were not in the same room during his daily visits to check on his elderly mother, he could clearly smell the crack-cocaine coming from his brother's basement apartment, and Respondent claims that he regularly inhaled this secondhand smoke. Respondent did not take any action against his brother because he was concerned that a domestic dispute would negatively impact his job.

However, this claim received only minimal corroboration, in the form of a typed letter purportedly written by Respondent's mother (Resp. Ex. A). In that letter, she states that Respondent's brother would often be smoking when Respondent visited the house, and that she believes Respondent's body was "contaminated" by this exposure.

Other than the letter, there is nothing in the record to support Respondent's trial testimony. Indeed, the credible evidence suggests that Respondent's claim is a recent fabrication. When summoned to the Medical Division for his drug test, Respondent did not say anything about this supposed exposure. More telling, after learning that he had tested positive for cocaine, which clearly threatened to implicate his job status, Respondent still did not mention to Dr. Ciuffo that he had been regularly exposed to secondhand smoke, even though the doctor specifically asked him if he had any other explanation for the positive test results.

Moreover, Dr. Paulsen effectively dispelled the notion that Respondent's positive test results stemmed from his exposure to his brother's secondhand smoke. Dr. Paulsen testified that the scenario suggested by Respondent would not give rise to the high concentration levels of cocaine found in the hair samples, which were roughly ten times the cutoff. Rather, the test results indicate that Respondent ingested a significant amount of cocaine over the six-month period leading up to the date of the drug test.

The record has established, by a preponderance of the credible evidence, that Respondent wrongfully ingested and possessed cocaine between February 10, 2022 and August 10, 2022. Accordingly, I find Respondent guilty of Specifications 1 and 2.

PENALTY

In order to determine an appropriate penalty, this Tribunal, guided by the Department's Disciplinary System Penalty Guidelines, considered all relevant facts and circumstances, including potential aggravating and mitigating factors established in the record. Respondent's employment history also was examined. See 38 RCNY § 15-07. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached memorandum. In 2014, Respondent forfeited 20 vacation days after pleading guilty to criminal association. He has been awarded four medals for Excellent Police Duty. Respondent testified that he also has received awards for perfect attendance.

Respondent, who was appointed to the Department on July 22, 2002, has been found guilty of wrongfully ingesting and possessing cocaine. The Department Advocate recommends that Respondent be terminated from his employment with the Department, while counsel for Respondent asks that a lesser penalty be imposed.

The NYPD is a drug-free workplace, and its employees are prohibited from using controlled substances. The Disciplinary Guidelines provide that the presumptive penalty for having a positive test result of a Schedule 1 drug, such as cocaine, is Termination. Notwithstanding Respondent's strong record during more than 20 years of service to the Department, the presumptive penalty is appropriate here. The concentration of cocaine detected in one of Respondent's hair samples was more than *eight times* the cutoff level required for a

positive test result, and the concentration in the second sample was more than *ten times* the cutoff, indicating that Respondent ingested a significant amount of cocaine during the six-month period leading up to the drug test.

Taking into account the totality of the facts and circumstances in this matter, I recommend that Respondent be DISMISSED from the New York City Police Department.

Respectfully submitted,



Jeff S. Adler
Assistant Deputy Commissioner Trials

APPROVED



NOV 01 2022
KEECHANT L. SEWELL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: SUMMARY OF EMPLOYMENT RECORD
POLICE OFFICER BRIAN DAVIS
TAX REGISTRY NO. 931624
DISCIPLINARY CASE NO. 2022-27034

Respondent was appointed to the Department as a Police Officer on July 22, 2002, having previously served as a School Safety Agent since December 1, 1997. On his three most recent annual performance evaluations, he was rated "Meets Standards" for 2019, 2020 and 2021. He has been awarded four medals for Excellent Police Duty.

In 2014, Respondent forfeited 20 vacation days after pleading guilty to criminal association.

In connection with the instant matter, Respondent was suspended without pay on August 18, 2022, and remains suspended with pay to date.

For your consideration.

Jeff S. Adler
Assistant Deputy Commissioner Trials